

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT JAY HEXIMER,

Petitioner,

v.

MARY K. BERGHUIS,

Respondent.

Civil No. 2:08-CV-14170

HONORABLE ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

OPINION AND ORDER DENYING A CERTIFICATE OF APPEALABILITY

On October 6, 2008, this Court dismissed petitioner's habeas application brought pursuant to 28 U.S.C. § 2254, on the ground that petitioner had failed to exhaust his state court remedies with respect to the twelve claims that he had raised in his habeas petition. *See Heximer v. Berghuis*, No. 2008 WL 4539431 (E.D. Mich. October 6, 2008). This Court further rejected petitioner's argument that he should be excused from exhausting at least some of the claims presented in his petition because his appellate counsel had refused to raise these claims in his appeal of right. *Id.* The Court subsequently denied petitioner's motion for reconsideration. On December 29, 2008, petitioner filed a notice of appeal. The Sixth Circuit has now remanded the case to this Court for a determination of whether petitioner should be granted a certificate of appealability. For the reasons that follow, the Court denies petitioner a certificate of appealability.

When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner

Heximer v. Berghuis, U.S.D.C. 08-14170

shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

The Court declines to issue a certificate of appealability regarding the dismissal without prejudice of petitioner's unexhausted claims for relief because "jurists of reason" would not find it debatable whether this Court was correct in its procedural ruling that petitioner had failed to exhaust an available state court remedy with respect to these claims. See *Colbert v. Tambi*, 513 F.Supp.2d 927, 939 (S.D. Ohio 2007).

Based upon the foregoing, IT IS ORDERED that the motion for a certificate of appealability is **DENIED**.

S/Arthur J. Tarnow
Arthur J. Tarnow
United States District Judge

Dated: March 30, 2009

I hereby certify that a copy of the foregoing document was served upon parties/counsel of record on March 30, 2009, by electronic and/or ordinary mail.

S/Catherine A. Pickles
Judicial Secretary